

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Reconsideration of Dismissal of)	File No. 20020426AAZ
Application for Assignment of Licenses from)	
United States Wireless Cable, Inc. to Rioplex)	
Wireless Ltd.)	

ORDER

Adopted: March 16, 2011

Released: March 18, 2011

By the Commission:

I. INTRODUCTION

1. In this Order, we decline to reinstate two Broadband Radio Services (“BRS”) licenses that automatically cancelled when the former licensee defaulted on its installment payment loan. Because the former licensee, United States Wireless Cable, Inc. (“USWC”), raised serious questions regarding its ongoing ability and willingness to fulfill its payment obligations, we find that application of our automatic license cancellation rule in this case serves the underlying purpose of that rule and promotes the public interest by protecting the integrity of our auction and licensing rules in a manner that is fair to all applicants that participate in our competitive bidding process. Therefore, we affirm the previous decision of the Wireless Telecommunications Bureau in this matter and deny the Application for Review filed by USWC together with its subsidiary, Reorganized United States Wireless Systems, Inc. (“USWS”).¹

II. BACKGROUND

A. The Commission’s Installment Payment Program

2. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment loan program under which qualified small businesses that won licenses in certain services were allowed to pay their winning bids in quarterly installments over the initial term of the

¹ United States Wireless Cable, Inc. and Reorganized United States Wireless Systems, Inc., Application for Review, filed January 25, 2008 (“AFR”). See Petition for Reconsideration of Dismissal of Application for Assignment of Licenses from United States Wireless Cable, Inc. to Rioplex Wireless Ltd., *Order*, 22 FCC Rcd 22,242 (WTB 2007) (“Bureau Order”).

The licenses at issue in this proceeding were originally part of the Multipoint Distribution Service (“MDS”). In 2004, the Commission amended the rules governing the MDS in order to encourage the deployment of broadband services by commercial and educational entities, and renamed MDS as BRS. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14,165 (2004). Because the new rules are in effect, we refer to the service by its new name.

license.² In deciding to offer installment payment loans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.³ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁴ When the Commission discontinued the use of installment payment loans for future license auctions in 1997,⁵ it allowed entities that were already paying for licenses in installments to continue doing so.⁶

3. Certain features of the Commission's installment payment rules have remained the same since their inception. The rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's installment

² Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994) (“*Competitive Bidding Second Report and Order*”). We note the Parties’ AFR refers to this decision as the “1994 Report and Order.” The first Commission auction for which installment payments were available was Auction 2 (218-219 MHz Service), which concluded on July 29, 1994.

³ *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 U.S.C. § 309(j)(3)(B), (4)(D).

⁴ See 47 C.F.R. § 1.2110(e)(3)(iii), (iv) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)).

⁵ The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-400 ¶¶ 38-40 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55 (2000) (“*Part 1 Reconsideration of Third Report and Order*”). The last Commission auction for which installment payments were available was Auction 11 (broadband PCS F block), which ended on January 14, 1997.

⁶ See generally *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

payment default, the license cancels automatically and the Commission institutes debt collection procedures.⁷ In other words, a licensee that defaults on an installment payment loses the license, is not refunded any prior payments and is subject to collection of the remaining balance of the debt.⁸

4. In 1997, the Commission liberalized its installment payment grace period rules for licensees that were already paying their winning bids in installments, providing these licensees with significant advantages not previously available to them. Under the initial installment payment rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee had properly filed a grace period request.⁹ The rules as amended in 1997, however, provided licensees with an automatic grace period, i.e., a grace period to which they were entitled without having to file a request.¹⁰ The amended rules also entitled all licensees paying in installments to a grace period of 180 days. Thus, if a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.¹¹ If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment.¹² A licensee's failure to make its required payment, including the associated late fees, by the end of the 180 day period placed it in default.¹³

⁷ See, 47 C.F.R. § 1.2110(e)(4) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)); and 47 C.F.R. § 1.2110(f)(4) (1998). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004) (addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults) (“*Part 1 Third Reconsideration of Third Report and Order*”). In this order, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

⁸ *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2561-62 ¶ 29. The Commission reasoned that this consequence is comparable to that of a non-installment payment post-licensing default on a license won at a Commission auction – such as a default resulting from failure to build out or egregious conduct – where the license is canceled, and no part of the full license payment is refunded. *Id.* at 2558 ¶ 18.

⁹ 47 C.F.R. § 1.2110(e)(4)(i), (ii) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)). Licensees were permitted to request a grace period of 90 to 180 days.

¹⁰ 47 C.F.R. § 1.2110(f)(4)(i), (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436-38 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

¹¹ 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

¹² 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

¹³ 47 C.F.R. § 1.2110(f)(4)(iv) (1998). These rules were amended in 2000 to provide licensees with two quarters (i.e., two three-month periods), rather than two ninety-day periods, in which to submit late installment payments and

(continued....)

5. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions¹⁴ and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred.¹⁵ Noting that a grace period is an extraordinary form of relief in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default.¹⁶

B. United States Wireless Cable ("USWC")

6. USWC won the BRS licenses for the Brownsville-Harlingen, Texas (MDB 056) and the Victoria, Texas (MDB 456) Basic Trading Areas ("BTAs") (collectively the "Licenses") in Auction 6, which concluded in March of 1996.¹⁷ As a small business, USWC was eligible to participate in the Commission's installment payment plan available for qualifying entities.¹⁸ In keeping with the Commission's rules, grant of the Licenses was conditioned upon USWC's full and timely performance of its payment obligations.¹⁹ USWC was scheduled to make interest-only payments for the first two years of the ten-year license term. Payments of interest and principal were to be amortized over the remaining eight years.²⁰

7. USWC began making its installment payments under the Commission's original installment payment rules. When the Commission's amended grace period rules became effective on March 16, 1998, USWC became subject to those rules.²¹ USWC made its payments pursuant to its signed security agreements and promissory notes through the end of 2000.²²

8. On October 27, 2000, USWS, a wholly owned subsidiary of USWC, filed for bankruptcy.²³ USWC and USWS (collectively "the Parties") contend that at the time that USWS filed for bankruptcy,

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associated late fees. *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28. This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.

¹⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

¹⁵ *Id.* at 443 ¶ 116.

¹⁶ *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,304-05 ¶ 19.

¹⁷ "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas," *Public Notice* (rel. March 29, 1996).

¹⁸ 47 C.F.R. § 21.960(b) (1996).

¹⁹ 47 C.F.R. §§ 1.2110(e)(4) (1996) and 21.960(b)(4) (1996) ("A BTA authorization issued to an eligible winning bidder that elects installment payments shall be conditioned upon the full and timely performance of the BTA authorization holder's payment obligations under the installment plan."). *See also Public Notice*, "FCC Announces Grant of MDS Authorizations," Report No. D-871 (rel. Aug. 16, 1996); *Public Notice*, "FCC Announces Grant of MDS Authorizations," Report No. D-902-A (rel. Dec. 30, 1996).

²⁰ 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1996) and 21.960(b)(3) (1996).

²¹ *See Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

²² AFR at 3-4.

²³ *Bureau Order*, 22 FCC Rcd 22,242 at 22,245 ¶ 10.

USWC had agreed to assign and transfer to USWS all of the rights in the Licenses.²⁴ USWC concedes, however, that it did not file any applications with the Commission to effectuate the assignment of the Licenses.²⁵

9. USWC failed to pay the installment payment due on the Brownsville license on February 28, 2001, along with the required late fees, before the expiration of the two quarters it was permitted under the rules. The Brownsville license therefore automatically canceled on September 1, 2001.²⁶ USWC then also failed to pay the installment payment due on the Victoria license on May 31, 2001, along with the required late fees, before the expiration of the two quarters it was permitted under the rules. The Victoria license therefore automatically canceled on December 1, 2001.²⁷ USWC accordingly became subject to debt collection procedures.²⁸

10. On April 26, 2002, Rioplex Wireless, Ltd. filed an assignment application to acquire the Licenses.²⁹ On August 7, 2002, the Commission provided debt acceleration letters to USWC.³⁰ On March 16, 2005, the Broadband Division of the Wireless Telecommunications Bureau (“the Division”) dismissed the Rioplex assignment application because the Licenses had automatically cancelled.³¹ On April 22, 2005, USWC, together with USWS, filed a Petition for Reconsideration of the dismissal of the assignment application and of the operation of automatic license cancellation rule, and requested reinstatement of the Licenses.³² While that Petition was still pending, USWS independently submitted a letter to the Commission that reiterated the request for reinstatement of the Licenses but sought to withdraw the request for reconsideration of the dismissal of the assignment application.³³

²⁴ AFR at 4.

²⁵ *Id.* (emphasis added) (“As of the date of the bankruptcy filing, all of the licenses and leases had been assigned to USWS *except for the BTA licenses.*”).

²⁶ 47 C.F.R. § 1.2110(g)(4)(iv); see also *Bureau Order*, 22 FCC Rcd at 22,245 ¶ 7.

²⁷ *Bureau Order*, 22 FCC Rcd at 22,245 ¶ 7.

²⁸ *Id.* See also *Part 1 Third Report and Order*, 13 FCC Rcd at 440, 443 ¶¶ 110, 116; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,315-16 ¶ 39.

²⁹ See File No. 20020426AAZ (April 26, 2002).

³⁰ AFR at 5. Although licensees participating in the installment payment program were generally allowed to pay for their licenses in installments over the initial license term, under the Commission’s installment payment rules, if a licensee defaulted on its installment payment, it was required to pay the entire remaining balance of the debt. 47 C.F.R. § 1.2110(g)(4)(iv). See *Part 1 Third Report and Order*, 13 FCC Rcd at 440, 443 ¶¶ 110, 116; *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2561-62 ¶ 29.

³¹ Letter from Mary M. Shultz, Deputy Chief, Broadband Division, to RioPlex Wireless Ltd. (March 16, 2005).

³² Petition for Reconsideration of Dismissal of Application for Assignment of MDS BTA Licenses from United States Wireless Cable, Inc. to RioPlex Wireless Ltd. in File No. 20020426AAZ filed on behalf of United States Wireless Systems, Inc. and United States Wireless Cable, Inc. on April 22, 2005 (Petition).

³³ Letter from James A. Stenger, counsel for United States Wireless Systems, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission dated March 6, 2007 (USWS Letter).

11. On December 28, 2007, the Wireless Telecommunications Bureau (“WTB”) denied the Petition for Reconsideration.³⁴ USWC and USWS then jointly filed the instant Application for Review on January 25, 2008 continuing to seek waiver of the Commission’s automatic cancellation rule and reinstatement of the Licenses.³⁵

III. DISCUSSION

A. The Bureau’s Decision is Consistent with the Communications Act and Relevant Precedent

12. The Commission will grant an application for review of a final action taken on delegated authority only when such action, *inter alia*, conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.³⁶ Here the Parties fail to establish any of these grounds.

13. The Parties argue that the Bureau’s decision denying their request for waiver of the Commission’s installment payment rules and for reinstatement of the Licenses violates the Commission’s rules adopted in the *Competitive Bidding Second Report and Order*, conflicts with other Commission precedent,³⁷ does not adhere to the Commission’s *pro forma* assignment and transfer policies, and contradicts the D.C. Circuit’s precedent in *Capital Telephone*³⁸ and *21st Century*.³⁹ For the reasons discussed herein, we conclude that the Bureau’s decision is fully consistent with the Communications Act as well as the Commission’s rules, policies and all relevant precedent regarding automatic license cancellation.

14. The Commission’s long-established policy and precedent regarding the installment payment automatic cancellation rule is clear and has been upheld by the D.C. Circuit.⁴⁰ In offering eligible small businesses the ability to pay their winning auction bids through the installment payment

³⁴ *Bureau Order*, 22 FCC Rcd 22,242.

³⁵ *See generally*, AFR. USWC and USWS jointly filed one Application for Review and thus we need not reach the question of whether USWS would have standing independent of USWC to file an Application for Review when USWC, not USWS, was the licensee. We note, however, that their inclusion of USWS as a party adds no weight to USWC’s claim that USWS’s status in bankruptcy prevented USWC’s licenses from cancelling.

³⁶ *See* 47 C.F.R. § 1.115. *See also*, Application for Review of Declaratory Ruling Issued by the Chief, Cable Services Bureau, In re Jay Lubliner and Deborah Galvin, Potomac, Maryland, *Memorandum Opinion and Order*, 13 FCC Rcd 16,107, 16,109 ¶ 4 (1998).

³⁷ AFR at 14-16 (arguing that the decision should be made consistent with other grant of waivers).

³⁸ AFR at 7(citing *Capital Telephone Company, Inc. v. Federal Communications Commission*, 498 F.2d 734 (D.C. Cir. 1974) (“*Capital Telephone*”).

³⁹ AFR at 7 (citing *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003)(“*21st Century*”); Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001) (“*21st Century Order on Reconsideration*”) *affirming*, Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,121-23 ¶¶ 17-20 (2000) (“*21st Century MO&O*”)) (explaining the Commission’s application of a strict standard of review for requests of waiver of its automatic cancellation rule).

⁴⁰ *See, Morris Communications, Inc. v. FCC*, 566 F.3d 184 (D.C. Cir. 2009) (“*Morris Appellate Opinion*”), *affirming*, *Morris Communications, Inc., Memorandum Opinion and Order*, 23 FCC Rcd 3179 (2008) (“*Morris Order*”).

program, the Commission's rules have always explicitly conditioned retention of a license on the full and timely payment of each installment.⁴¹ The rules state that failure to do so results in the automatic cancellation of the license.⁴² The rules provide for this consequence because compliance with the Commission's payment rules is critical to realizing the public interest objectives of section 309(j) of the Communications Act.⁴³ Under the rules and policies implementing its auction authority, the Commission presumes that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum and is best able to put the licenses to use for the benefit of the public.⁴⁴ Entities demonstrate that they merit this presumption by paying the full amounts bid for those licenses.⁴⁵ Thus, requiring licensees to demonstrate their continuing ability to pay as a condition of holding a license is essential to an efficient licensing process that is fair to all auction participants, both those who win licenses and those who do not.⁴⁶

15. The Commission has reasoned that the presumption that the auction assigned the license to the party that placed the highest value on the spectrum is lost when licensees paying winning bids in installments fail to pay the principal, related interest, and any late fees in compliance with the Commission's rules.⁴⁷ If the Commission were to allow licensees to keep their licenses after they had failed to comply with the Commission's payment rules, it would increase the incentive for bidders to make bids they could not pay and reduce opportunities for other bidders to win licenses.⁴⁸ By increasing the likelihood that winning bidders will be entities that are able to pay their bids and provide service to

⁴¹ See 47 C.F.R. § 1.2110(d)(4) (1994); see also 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(D) as 47 C.F.R. § 1.2110(d)).

⁴² 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(iii) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)); see *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2553 ¶ 6. Under the Commission's rules and precedent, once a license automatically cancels, the license term ends; the outstanding debt is accelerated; and the former licensee is no longer eligible to participate in the Commission's installment payment plan. 47 C.F.R. § 1.2110(g)(4)(iv); See, e.g., *Morris Order*, 23 FCC Rcd at 3190-91 ¶ 26, *aff'd*, *Morris Appellate Opinion*, 566 F.3d 184.

⁴³ See, *Alpine PCS, Inc., Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses, Memorandum Opinion and Order*, 25 FCC Rcd 469 (2010) ("*Installment Payment Order*") *aff'd*, *Alpine PCS, Inc. v. FCC*, No. 10-1020, 2010 WL 5258942 (D.C. Cir. Dec. 21, 2010); see also *Morris Order*, 23 FCC Rcd at 3194 ¶ 34.

⁴⁴ *Installment Payment Order*, 25 FCC Rcd at 482 ¶¶ 20-21. See also, Letter from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Ronald E. Quirk, Jr., Counsel for Morris Communications, Inc., 20 FCC Rcd 8176, 8179-81 (2005) ("*Morris Division Order*") (citing *21st Century MO&O*, 15 FCC Rcd at 25,123-24), *aff'd*, *Morris Order*, 23 FCC Rcd at 3194 ¶ 34. In the *Morris Order*, the Commission noted that the Division, in denying Morris's request for waiver, had correctly observed that if the Commission were to exercise much flexibility in relieving bidders from their bid obligations, the bid would cease to operate as an effective proxy for identifying those who value the spectrum the most, thereby undermining the presumption that the high bidder is best able to put the spectrum to efficient and effective use for the benefit of the public. *Morris Order*, 23 FCC Rcd at 3194 n.106.

⁴⁵ *Installment Payment Order*, 25 FCC Rcd at 482 ¶ 20.

⁴⁶ *Id.* See also, *Morris Division Order*, 20 FCC Rcd at 8179-81 (citing *21st Century MO&O*, 15 FCC Rcd at 25,123-24), *aff'd*, *Morris Order*, 23 FCC Rcd at 3194 ¶ 34, *aff'd*, *Morris Appellate Opinion*, 566 F.3d 184.

⁴⁷ *Installment Payment Order*, 25 FCC Rcd at 482 ¶¶ 20-21. See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22; see also, *Morris Order*, 23 FCC Rcd at 3194 ¶ 34, *aff'd*, *Morris Appellate Opinion*, 566 F.3d 184.

⁴⁸ *Installment Payment Order*, 25 FCC Rcd at 482 ¶¶ 20-21. See, e.g., *Duluth PCS, Inc. and St. Joseph PCS, Inc., Request for Partial Waiver of the Section 1.2110(g) of the Commission's rules, Order*, 19 FCC Rcd 7137, 7139-40 ¶ 5 (WTB/ASAD 2004) ("*Duluth PCS Order*").

the public, the Commission furthers economic opportunity and competition in the marketplace.⁴⁹ In this manner, strict enforcement of the installment payment rules preserves a fair and efficient licensing process and promotes the rapid deployment of services for the benefit of the public.⁵⁰ Here, the Parties present no persuasive arguments to convince us to deviate from this precedent.

16. *Competitive Bidding Second Report and Order and other Commission precedent.* The Parties summarily claim that the Bureau erred in not applying the original rules on installment payment defaults set forth in the *Competitive Bidding Second Report and Order* and related Commission and judicial precedent.⁵¹ Accordingly, they argue that the Licenses should not be subject to automatic cancellation.⁵² Furthermore, the Parties claim that, by strictly enforcing the installment payment rules, the Commission failed to consider requests for waiver of the installment payment rules on a case-by-case basis.⁵³

17. As an initial matter, we reject the Parties' claim that we must apply the factors outlined in the *Competitive Bidding Second Report and Order* for determining whether to grant a grace period for an installment payment deadline to their request for waiver of the automatic cancellation rule.⁵⁴ In the *Competitive Bidding Second Report and Order*, the Commission explained the factors that it would use to consider whether to grant a three to six month grace period of an impending installment payment deadline under the Commission's then applicable rules.⁵⁵ As explained above, in 1997 the Commission amended those installment payment rules so that licensees would no longer be required to file such requests for additional time to render an installment payment, and would instead have an automatic grace period of up to two quarters to make their payments, along with the appropriate late fees.⁵⁶ Thus, the factors outlined in the *Competitive Bidding Second Report and Order* for determining whether to grant a pre-default request for additional time to make an installment payment under the former grace period rules do not apply to a post-default request for waiver of the automatic cancellation rule, where the Parties already received two automatic quarterly grace periods for making an installment payment and then requested waiver of the automatic license cancellation rule after defaulting on their payment obligation.⁵⁷

18. We also disagree with the Parties' assertion that, under the *Competitive Bidding Second Report and Order*, the sanction for a licensee's default on its installment payment obligation was something other than automatic license cancellation.⁵⁸ The Parties erroneously contend that the *Competitive Bidding Second Report and Order* indicated that the penalty for all failures to comply with the terms of a license would result in the forfeiture of the licensee's 20 percent down payment.⁵⁹ The

⁴⁹ *Installment Payment Order*, 25 FCC Rcd at 482 ¶¶ 20-21. See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22.

⁵⁰ *Installment Payment Order*, 25 FCC Rcd at 482 ¶¶ 20-21. See *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22; *Morris Order*, 23 FCC Rcd at 3194 ¶ 34; *Morris Appellate Opinion*, 566 F.3d at 191 n.6.

⁵¹ AFR at 7-11.

⁵² *Id.* at 9.

⁵³ *Id.*

⁵⁴ *Id.* at 6-7; 9-11.

⁵⁵ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391 ¶ 240.

⁵⁶ 47 C.F.R. § 1.2110(f)(4)(i), (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436-38 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

⁵⁷ See, e.g., *Morris Appellate Opinion* (affirming the Commission's decision denying a waiver of its installment payment rules under the Commission's general standard for considering waiver requests in 47 C.F.R. § 1.925(b)(3)).

⁵⁸ AFR at 9.

⁵⁹ *Id.*

language which USWC relies on for this argument, however, does not support the conclusion that the Commission intended to apply to installment payment defaults, the same sanctions it applies to a winning bidder's default on its down payment.⁶⁰ Instead, where the *Competitive Bidding Second Report and Order* directly addresses installment payments it makes clear that the failure to render timely payment will result in license cancellation and subject the defaulting licensee to the Commission's debt collection procedures.⁶¹ Moreover, contrary to the argument presented, the Commission did not change any of the terms and conditions for the subject Licenses and USWC knew or should have known how the automatic license cancellation rule would operate in the event of an installment payment default. As stated above, since the inception of its loan program, the Commission's installment payment rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures to collect the full amount of the outstanding debt obligation.⁶² In fact, in the *Part 1 Third Reconsideration of Third Report and Order*, the Commission clearly explained that the installment payment rules had, in all material respects, remained unchanged in language and application since their inception, and it specifically rejected an assertion that it had engaged in retroactive rulemaking.⁶³

19. The Parties also erroneously claim that the Commission violates the rules established in the *Competitive Bidding Second Report and Order* by failing to consider requests for waiver of the installment payment rules on a case-by-case basis.⁶⁴ To the contrary, our policy of strict enforcement of the automatic cancellation rule requires careful consideration of waiver requests on a case-by-case basis.⁶⁵ In each case in which a waiver of the installment payment rules has been requested, our precedent demonstrates that we have examined the circumstances in detail to determine whether the waiver standard is met and the public interest would be served by preserving the license assignment, despite a missed

⁶⁰ *Id.* (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382-83, 2388 ¶¶ 196-97, 226).

⁶¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2391 ¶ 240.

⁶² See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)) and 47 C.F.R. § 1.2110(f)(4) (1998). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004). In this Order addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. *Id.* at 2561-62 ¶¶ 29-31.

⁶³ *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2551-58 ¶¶ 1-20, 2559 ¶¶ 21-22. The Commission also held that, even had the rule been changed, such a change would have been permissible under federal precedent and particularly under *Celtronix*. *Id.* at 2559 ¶¶ 21-22.

⁶⁴ AFR at 10-11.

⁶⁵ 47 C.F.R. § 1.925. To obtain a waiver of the Commission's rules, an applicant must show either (i) that the underlying purpose of the applicable rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique factual circumstances of the particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

payment deadline.⁶⁶ Thus, the Commission has granted waivers when it has found that there was no serious question regarding the defaulting licensee's ongoing ability and willingness to fulfill its payment obligations despite its default and, therefore, no question regarding the presumption that it remained best suited to utilize the spectrum.⁶⁷ In contrast, in circumstances like those that USWC presents, where a defaulting licensee did not promptly pay its debt in full after acceleration or did not make continuing post-default payments with an unconditional promise to pay its accelerated debt in accord with the Commission's payment terms, the Commission has consistently denied requests for waiver of the automatic cancellation rule based on the licensee's failure to demonstrate its ability and willingness to pay.⁶⁸ USWC has raised concerns about its ongoing ability and willingness to fulfill its payment obligations after the default by not making any payments for almost ten years and offering only unsupported promises to pay the debt in full at some future time. In such circumstances, any representations regarding a history of making payments, the provision of service, or the potential existence of a proposed assignee have not outweighed such concerns or justified waiver of the automatic cancellation rule under either prong of our waiver standard.⁶⁹ Thus, contrary to the Parties' contentions, USWC is not similarly situated to the licensees in the matters of *Advanced* and *Leaco*. Rather, USWC is similarly situated to other defaulting licensees to whom the Commission has denied waivers.

20. *Capital Telephone*. The Parties also contend that the Bureau erred in failing to recognize that the Licenses constituted property of the USWS bankruptcy estate. They argue that the D.C. Circuit's decision in *Capital Telephone*⁷⁰ stands for the proposition that the Commission treats commonly owned and controlled corporate entities as one for the purposes of applying its licensing rules.⁷¹ Moreover, the Parties maintain that the Licenses should be considered part of the USWS bankruptcy estate because, they contend, the assignment of the Licenses from USWC to USWS would have been a *pro forma* assignment, requiring no prior Commission approval, under the Commission's rules.⁷²

21. The Parties misapply the decision in *Capital Telephone*. In *Capital Telephone*, four applicants vied for two available radio licenses. The Commission recognized that two of the applicants were in reality a single entity – one applicant in the name of an individual and the other applicant in the name of a corporation he created and controlled – and the Commission restricted the combined entity to only a single license application. The D.C. Circuit affirmed the Commission's decision treating the two applicants as a single entity on the ground that the Commission should be able to look through corporate structure to avoid shams or circumvention of its rules.⁷³ That case does not cast doubt on the correctness

⁶⁶ See, e.g., *Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, Order*, 21 FCC Rcd 1182 (WTB 2006) ("*Leaco Order*"); *Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, Order*, 21 FCC Rcd 1627 (WTB 2006) ("*Advanced Order*").

⁶⁷ See, e.g., *Advanced Order*, 21 FCC Rcd at 1632, 1633 ¶¶ 11, 12, 14; *Leaco Order*, 21 FCC Rcd at 1185-87 ¶¶ 10-12. See also *Big Sky Wireless Partnership, Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Butte, Montana Basic Trading Area, MDB064, Order*, 21 FCC Rcd 10,066, 10,070-71 ¶¶ 11-12, 10,072 ¶ 14 (WTB 2006) ("*Big Sky Order*").

⁶⁸ *Installment Payment Order*, 25 FCC Rcd at 482 ¶ 22. See also *Morris Order*, 23 FCC Rcd at 3194-3195 ¶ 35 (citing, e.g., *21st Century MO&O*, *Lancaster Order*, and *Satellite Signals Order*).

⁶⁹ *Installment Payment Order*, 25 FCC Rcd at 487-88 ¶ 29. See 47 C.F.R. § 1.925(b)(3).

⁷⁰ *Capital Telephone*, 498 F.2d 734.

⁷¹ AFR at 11-12.

⁷² *Id.*

⁷³ *Capital Telephone*, 498 F.2d at 738.

of the Bureau's decision to apply the automatic cancellation rule, which was based on policies and rules implementing the Commission's competitive bidding authority under section 309(j) of the Act.⁷⁴ Indeed, the Parties' argument stands *Capital Telephone* on its head. *Capital Telephone* empowers the Commission in appropriate cases to look through corporate structures to protect the integrity of the Communications Act and regulations from corporate manipulations designed to avoid regulation, whereas the Parties here seek to circumvent the Commission's regulations by arguing that an affiliated company has rights as a licensee without having first sought and obtained the prior Commission license grant that is expressly required by the Communications Act and the Commission's Rules.

22. The Parties' contention that the Commission's *pro forma* transfer rule dictates a different outcome is also unconvincing. While the Commission does forbear from requiring prior approval for certain *pro forma* assignment and transfer applications, we have always required prior notice and Commission approval under section 310(d) of the Act for designated entity applicants, like USWC, that utilized installment payment financing.⁷⁵ The Parties concede that they neither sought nor received any Commission approval to assign the Licenses from USWC to USWS. The Bureau therefore correctly held that the Licenses automatically cancelled outside of the USWS bankruptcy estate pursuant to the terms and conditions of the Licenses and section 1.2110 of the Commission's rules.

23. *21st Century*. The Parties also argue that the decision of the D.C. Circuit in *21st Century* supports a grant, rather than a denial, of their waiver request.⁷⁶ The Parties claim that the court in *21st Century* found that broadband PCS licensees were bound by post-auction rule changes only because those changes were offered to licensees as part of a menu of options to address their financial distress.⁷⁷ The Parties therefore reason that because they were not offered similar restructuring alternatives and did not accept benefits from the Commission in return for the acceptance of post-auction rule changes, they should be held to what they characterize as a more flexible waiver standard, and they should be offered a menu of options to resolve their payment issues like those that were offered to PCS licensees.⁷⁸

24. The D.C. Circuit did not, as the Parties assert, affirm the Commission's denial of a waiver of the automatic license cancellation rule only because the Commission had offered restructuring options to broadband PCS licensees. Rather, the court affirmed the denial of a waiver because it found unconvincing *21st Century*'s argument that the Commission failed to provide it with notice of its payment obligations before its licenses cancelled.⁷⁹ As the court explained, the record demonstrated that "*21st*

⁷⁴ AFR at 11-12. Yet, to the extent the Parties cite *Capital Telephone* for the proposition that a Commission licensee takes its authorization subject to certain conditions and is bound by those conditions, we fully agree. As we stated above, USWC took the Licenses subject to the condition of full and timely payment. The Bureau therefore properly concluded that, upon its default, USWC was subject to the automatic license cancellation rule.

⁷⁵ Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, *Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6307-08 ¶¶ 25-26 (1998).

⁷⁶ See generally *21st Century*; *21st Century Order on Reconsideration*, 16 FCC Rcd 17,257 affirming, *21st Century MO&O*, 15 FCC Rcd 25,113, 25,121-23 ¶¶ 17-20 (explaining the Commission's application of a strict standard of review for requests of waiver of its automatic cancellation rule).

⁷⁷ AFR at 13.

⁷⁸ *Id.* at 13-14.

⁷⁹ See *21st Century*, 318 F.3d at 201-202. The court of appeals held that because the record showed that *21st Century* had actual notice of its payment obligations before its licenses canceled, the court did not need to decide if the Commission's rules required such notice. *Id.* at 201. The Parties also erroneously assert that the Commission denied other requests for waiver of the automatic license cancellation rule for various defaulting PCS licensees based only upon the fact that it had offered prior restructuring options to those licensees. See AFR at 14 n.34. We
(continued....)

Century sought a waiver of the automatic cancellation rule not because of confusion over the amount it owed but because it was not in possession of sufficient funds to make timely payment.”⁸⁰

25. The D.C. Circuit’s finding in that regard is particularly relevant to the Parties’ claim that waiver is justified because the Trustee of USWS’s bankruptcy estate did not receive USWC’s payment history as he requested.⁸¹ In *21st Century*, the court recognized that, even assuming a licensee had some genuine uncertainty regarding the precise amount of its debt, that confusion would hardly justify the decision to make no payment at all.⁸² The court’s reasoning is equally applicable in this case. Assuming *arguendo* that it would have been appropriate for Commission staff to provide USWC’s financial information to the Trustee of the USWS bankruptcy, a third party, and that the Parties had any legitimate uncertainty about the amount USWC owed in 2001, such confusion does not justify USWC’s failure to make any payments towards its outstanding installment debt obligations for the better part of a decade, and certainly does not provide the basis upon which to grant a waiver of the automatic license cancellation rule.

26. The remaining cases upon which the Parties rely involve licensees that had sought protection under the United States Bankruptcy Code prior to the operation of the automatic license cancellation rule.⁸³ For all the reasons discussed herein, that precedent does not apply to USWC. We therefore conclude that the Bureau properly applied our rules and the relevant precedent, and that the Parties have failed to establish any grounds to over turn that decision.

B. The Bureau’s Decision Did Not Conflict with Bankruptcy Laws

27. In addition to its regulatory arguments, the Parties also maintain that the Bureau’s decision incorrectly applied applicable bankruptcy laws.⁸⁴ Here too, we disagree. Notably, the Parties impermissibly introduce new bankruptcy arguments that were not argued before the Bureau.⁸⁵ These arguments, even if they had been properly presented, lack merit.

28. In particular, the Parties now claim that in denying the Petition the Bureau: (1) failed to address section 541 of the Bankruptcy Code; (2) did not consider a consent judgment entered by the Bankruptcy Court in the USWS bankruptcy case; and (3) violated section 525 of the United States Bankruptcy Code⁸⁶ by discriminating against USWS for being a debtor in bankruptcy and against USWC for being “associated” with such a debtor.⁸⁷ We disagree and conclude that the Bureau’s decision was fully consistent with the Bankruptcy Court’s judgment, and with sections 541 and 525 of the Bankruptcy Code. We address each argument in turn.

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note the Commission has consistently denied relief from the automatic license cancellation rule for defaulting licensees, PCS or otherwise, because they failed to meet the standard for waiver of our rules. *See generally Installment Payment Order.*

⁸⁰ *21st Century*, 318 F.3d at 202.

⁸¹ AFR at 14.

⁸² *21st Century*, 318 F.3d at 202.

⁸³ AFR at 15-16.

⁸⁴ *Id.* at 17-21.

⁸⁵ *See* 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”).

⁸⁶ 11 U.S.C. § 525.

⁸⁷ AFR at 18-21.

29. First, the Parties argue that the pre-bankruptcy agreement between USWC and USWS to assign the Licenses to USWS created an “equitable” interest in the Licenses that became part of the USWS bankruptcy estate pursuant to section 541 of the Bankruptcy Code.⁸⁸ Section 541 of the Bankruptcy Code⁸⁹ provides that all legal and equitable interests of the debtor become property of the bankruptcy estate upon the commencement of the bankruptcy case. Only those interests held by the debtor pre-petition, however, can be incorporated into the bankruptcy estate; the estate cannot obtain a greater interest than the pre-petition debtor.⁹⁰ Even assuming *arguendo* that USWS obtained an equitable interest in the Licenses from its unfulfilled contractual rights to acquire them from USWC, it is uncontested that the actual Commission licenses that grant the authorization for the use of the spectrum remained with USWC.⁹¹ The Parties concedes this crucial point, admitting in the AFR that “USWS had an equitable interest, *though not legal title*, to the BTA Licenses.”⁹²

30. It is the license as granted, not a contractual “equitable” interest in a license that was granted to another entity, which is relevant to the Communications Act and the Commission’s automatic cancellation rule. Section 310(d) of the Communications Act provides that “[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any matter...to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”⁹³ Here, the Commission never consented to the assignment of the Licenses from USWC to USWS. Thus, the authorization provided by the license had not passed to USWS such that the operation of protections afforded by the Bankruptcy Code would have prevented the automatic operation of the Commission’s regulatory provisions. Accordingly, the Parties’ argument that the bankruptcy estate possessed an “equitable” interest in the Licenses is irrelevant to the analysis of the operation of the Commission’s automatic cancellation rule, and the Bureau did not err in concluding that USWC, not USWS, was the licensee at all relevant times, both before and after the commencement of the USWS bankruptcy case.

31. Moreover, insofar as USWC did not file for bankruptcy protection prior to the automatic cancellation of the Licenses, it is not similarly situated to licensees that did, and it is not afforded any of the protections of the Bankruptcy Code that would otherwise bar the enforcement of the Commission’s payment rules. Thus, contrary to the Parties’ arguments, the Bureau’s decision was fully consistent with the Commission’s resolution of bankruptcy litigation. In *FCC v. NextWave Personal Communications, Inc.*, the Supreme Court ruled that section 525(a) of the Bankruptcy Code barred the Commission from enforcing its automatic license cancellation rule against NextWave, a licensee in bankruptcy, upon its failure to make timely payments for the debt associated with its licenses.⁹⁴ However, as the Bureau properly explained in denying the Petition, if section 525(a) of the code does not apply because the

⁸⁸ *Id.* at 18.

⁸⁹ 11 U.S.C. § 541.

⁹⁰ See *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.) (bankruptcy law does not create property rights where they would not otherwise exist), *cert. denied*, 469 U.S. 982 (1984); *In re Braniff Airways, Inc.*, 700 F.2d 935, 941-942 (5th Cir. 1983) (similar); H.R. Rep. No. 95-595, at 367 (the Bankruptcy Code’s property provisions do not “expand the debtor’s rights against others more than they exist at the commencement of the case”).

⁹¹ AFR at 4 (emphasis added) (“As of the date of the bankruptcy filing all of the licenses and leases had been assigned to USWS *except for the BTA licenses*.”).

⁹² *Id.* at 18 (emphasis added).

⁹³ 47 U.S.C. § 310(d).

⁹⁴ *FCC v. NextWave Personal Communications Inc., et al.*, 537 U.S. 293 (2003) (affirming the D.C. Circuit’s decision, 254 F.3d 130 (D.C. Cir. 2001), that because NextWave was under protection of Chapter 11 of the United States Bankruptcy Code, its licenses did not automatically cancel for nonpayment while it was in bankruptcy) (“*NextWave*”).

licensee did not file for bankruptcy prior to the automatic cancellation of the license, nothing in the *NextWave* decision prevents the regular operation of the Commission's automatic cancellation rules.⁹⁵ For that reason, we reject the attempt of the Parties to analogize its situation to that of licensees that avoided the application of the automatic cancellation rule by filing for Chapter 11 bankruptcy protection prior to missing their required installment payments.

32. Because USWC was not in bankruptcy, the Commission's automatic cancellation rule fully applied to the Licenses held by USWC.⁹⁶ The Bureau therefore correctly held that the Licenses automatically cancelled outside of the USWS bankruptcy case pursuant to the terms and conditions of the Licenses and section 1.2110 of the Commission's rules.

33. The Parties nonetheless argue that because the estate had an "equitable" interest in the Licenses, the Commission was required to seek permission of the bankruptcy court before removing property from the bankruptcy estate by application of the automatic license cancellation rule. We disagree. The Parties cite no authority for this argument, and we conclude that it has no merit. The contractual interest of USWS to acquire the Licenses existed only so long as the Licenses existed. When USWC defaulted on its payment obligations and the Licenses cancelled automatically by operation of the Commission's rules, USWS's equitable interest to acquire those licenses also automatically terminated.⁹⁷ Because the Licenses cancelled by operation of law outside of the bankruptcy case, prior permission by the court was not necessary for the automatic cancellation to be effective.⁹⁸

34. The Parties' remaining bankruptcy arguments also fail. To support their claims, they rely heavily on an Agreed Partial Judgment entered by the Bankruptcy Court in the USWS bankruptcy case.⁹⁹ A review of that judgment, however, establishes that it did not preclude the Commission from exercising its regulatory authority over the Licenses, including the application of the automatic cancellation rule. The Agreed Partial Judgment arose out of an adversary proceeding instituted by the USWS Trustee against USWC seeking damages and injunctive relief against USWC for failing to execute the FCC applications to assign the USWC licenses to USWS.¹⁰⁰ The parties reached a partial settlement of the case and agreed to the entry of an "Agreed Partial Judgment" on May 6, 2002.¹⁰¹ The Agreed Partial Judgment recognized that USWS had contractual rights to acquire the Licenses from USWC, but the

⁹⁵ *Installment Payment Order*, 25 FCC Rcd at 496 at ¶¶ 47-48.

⁹⁶ The automatic cancellation of the subject Licenses was not precluded by the *NextWave* case because USWC was not a debtor in a Chapter 11 bankruptcy case and the installment payment debt owed by USWC was not dischargeable in USWS's bankruptcy case.

⁹⁷ See *In re Beck*, 5 B.R. 169 (Bankr. D. Haw. 1980) (upon termination of license agreement, which expired by its terms while debtor was in bankruptcy, debtor no longer had property interest in such licenses); *Good Hope Refineries, Inc. v. Benavides*, 602 F.2d 998 (1st Cir. 1979) (options held by the debtor cannot be resurrected by bankruptcy court once they have expired by their own terms). See also *Counties Contracting & Constr. Co. v. Constitution Life Ins. Co.*, 855 F.2d 1054, 1058 (3d Cir. 1988) (where an insurance contract expired according to its terms during the course of the bankruptcy, the trustee's right to assume the contract and cure the default was thereby extinguished).

⁹⁸ See *In re Gull Air, Inc.*, 890 F.2d 1255, 1261-1262 (1st Cir. 1989) (right to use landing slots automatically terminated by operation of law under the applicable FAA regulations during the bankruptcy case, without further order of the bankruptcy court); *In re Trigg, Inc.*, 630 F.2d 1370, 1373-74 (10th Cir. 1980) (mining rights automatically terminated during bankruptcy case by operation of law, without further approval of the bankruptcy court).

⁹⁹ AFR at 18-19; Exhibit 3.

¹⁰⁰ *Id.*, Exhibit 2.

¹⁰¹ *Id.*, Exhibit 3 at p. 1.

consent judgment did not purport to grant the Licenses to USWS.¹⁰² Instead, the Agreed Partial Judgment specifically acknowledged that “legal title” remained with USWC as reflected in “the records of the Federal Communications Commission.”¹⁰³

35. Further, the Parties concede that the Agreed Partial Judgment relates only to the estate’s “equitable” interest in the Licenses.¹⁰⁴ The lack of applicability of the Agreed Partial Judgment to this regulatory matter was also confirmed by the Trustee’s counsel in correspondence with bankruptcy counsel for the Commission in which the Trustee’s counsel specifically agreed with the Commission’s counsel that “nothing in [the Agreed Partial Judgment] affects the FCC.”¹⁰⁵ In short, the Agreed Partial Judgment had no impact at all on the automatic cancellation issue. The Bureau’s determination was, therefore, correct and fully consistent with the Agreed Partial Judgment.¹⁰⁶

36. The Parties also assert that the Bureau’s denial of their request for waiver of the automatic cancellation rule violates the anti-discrimination provision of section 525 of the Bankruptcy Code.¹⁰⁷ Here too, we disagree. Section 525 of the Bankruptcy Code provides, in pertinent part, that a governmental unit cannot “discriminate” with respect to a license grant against a person “solely” because that person is or has been a debtor in bankruptcy or has been associated with a debtor.¹⁰⁸ The Parties claim that USWC was discriminated against because the assignment of the licenses from USWC to USWS should have been treated as a *pro forma* application, requiring no prior Commission approval, and because the Commission staff should have responded more rapidly to the USWS Trustee’s request for USWC’s payment history on the licenses.¹⁰⁹

37. As discussed fully above, the Commission enforced its rules here consistent with its precedent.¹¹⁰ Thus, there was nothing discriminatory regarding the Commission’s application of its licensing rules. First, and most fundamentally, no application for assignment of the licenses from USWC to USWS was ever filed. Second, even if an assignment application had been filed, the Commission’s rules would not have provided for forbearance from the Commission’s prior approval requirements because USWC was a designated entity, and applications for assignment from such entities are not

¹⁰² It is clear that the bankruptcy court did not have the authority to assign the licenses to USWS without the Commission’s prior consent pursuant to Section 310(d) of the Communications Act. The Supreme Court has long recognized that determinations to grant or deny a radio license are exclusively within the regulatory province of the Commission, not the courts. *See FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946) (“it is the Commission, not the courts, which must be satisfied that the public interest will be served [in issuing a] license”). *See also Radio Station WOW, Inc v. Johnson*, 326 U.S. 120, 131 (1945)(finding that a state court order seeking to control the regulatory filings by parties to license applications exceeded the court’s authority because it would impose “restrictions upon the licensing system which Congress established”). Thus, had the bankruptcy court purported to issue an order recognizing a transfer of legal title from USWC to USWS, it would have exceeded its judicial power.

¹⁰³ AFR, Exhibit 3 at p. 2.

¹⁰⁴ *Id.* at 18 (“The *equitable interest* of USWS in the BTA Licenses was confirmed in a judgment issued by the United States Bankruptcy Court on May 6, 2002.”) (emphasis added).

¹⁰⁵ *Id.* at 19; Exhibit 7 at p.1.

¹⁰⁶ Moreover, the Agreed Partial Judgment was not entered until May 2002, long after the licenses automatically cancelled for non-payment by USWC. Neither the parties nor the bankruptcy court had the power to revive the licenses by their litigation settlement and entry of an Agreed Partial Judgment.

¹⁰⁷ AFR at 20-21.

¹⁰⁸ 11 U.S.C. § 525.

¹⁰⁹ AFR at 20.

¹¹⁰ *See generally Installment Payment Order.*

handled as *pro forma* applications.¹¹¹ Furthermore, our strict enforcement of the automatic license cancellation rule was not based in any respect on the bankruptcy of USWS, but rather on the uniform application of our precedent as it applies to USWC. For the reasons stated above, the Parties do not present a sufficient basis for a waiver of the automatic cancellation rule under our applicable precedent. In sum, the Bureau's decision to deny the Parties' Petition properly applied the Commission's policies and rules to USWC and USWS, and did not discriminate against them at all.

38. There was also nothing discriminatory regarding the Commission's disposition of USWC's payment history. As a general matter, the Commission's procedures prohibit the staff from issuing a licensee's financial information to a third party. Here, USWS's Trustee was clearly not the licensee, and the staff properly refused to provide payoff information without the specific consent of the licensee USWC. Moreover, these procedures to protect a licensee's confidentiality had no effect at all on the ability of USWC to continue to make its required full and timely installment payments to the Commission. USWC was the party responsible for making those payments, not the Trustee, and USWC had been making its payments prior to USWS's bankruptcy. Nothing in the USWS bankruptcy filing prevented USWC from continuing to make full and timely payment of its installment loan obligations. Further, to the extent that the Trustee needed the past payment history of USWC for his work on the USWS bankruptcy case, he could have requested the same payment history information directly from USWC. It appears that it was the on-going contract dispute between USWC and the USWS Trustee (as reflected in the litigation brought by the Trustee against USWC and its President), that was the cause of the failure of the USWS Trustee to obtain payment information directly from USWC. And, as fully discussed above, any confusion or uncertainty regarding USWC's payment obligations would not excuse its failure to render any payments for almost ten years. Accordingly, this argument provides no basis upon which to grant the relief sought.

IV. ORDERING CLAUSE

39. Accordingly, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by United States Wireless Cable, Inc. and United States Wireless Systems, Inc., on January 25, 2008 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹¹ See *supra* para. 22.